

No 49772-7-II.

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

PENINSULA HOUSING AUTHORITY

Appellant,

v.

LEE ANN DANIELS, and all other occupants of the premises,

Respondents.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Christopher Melly
Cause No. 16-2-00371-3

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Peninsula Housing Authority (“**PHA**”) submits this brief in reply to Respondent’s Reply Brief. Issues raised in Respondent’s Reply Brief not specifically discussed in this brief in reply were sufficiently addressed the Brief of Appellant, and will not be readdressed herein.

As a brief summary of the relevant factual background of this matter, PHA sued one of its tenants, Lee Ann Daniels (“**Tenant**”), for unlawful detainer because she failed to pay her rent. The trial court entered an Order for Issuance of Writ of Restitution, awarding possession of the leased premises to PHA. After entry of the Order, the parties came to an agreement that allowed Tenant to retain possession of the leased premises, provided she paid the delinquent amount she owed to PHA under the Lease.

Subsequently, PHA moved for a judgment against Tenant to recover its attorneys’ fees and costs in the matter. The trial court initially denied PHA’s motion. After PHA moved for reconsideration, the trial court reversed itself, agreeing that Tenant had a contractual and statutory obligation to pay PHA’s attorneys’ fees and costs. Accordingly, the trial court granted PHA a judgment against Tenant for attorneys’ fees and costs. However, independent of the trial court’s acknowledgement that the attorneys’ fees and costs for which PHA was seeking a judgment against Tenant were objectively reasonable, the trial court significantly decreased

the amount of PHA's attorneys' fees and costs awarded, citing Tenant's supposed economic status as the basis for the reduction.

For the reasons argued below, as well as those argued in PHA's opening brief, the judgment should be reversed and this case should be remanded for entry of a judgment for the full amount of PHA's reasonable attorneys' fees and costs.

II. ARGUMENT

The underlying issue appealed in this matter is whether the trial court abused its discretion by reducing PHA's reasonable attorneys' fees and costs award. While Tenant's reply brief raises some issues related to the case between PHA and Tenant, many of the issues presented by Tenant are beyond the scope of the issue being appealed by PHA and are therefore not properly before this Court. In this reply brief, PHA addresses the issues raised by Tenant, and notes which issues are beyond the scope of the issue raised for appeal. In the final analysis, there is not merit to the issues raised by Tenant, and PHA's appeal should be granted.

A. The Lease's Attorney Fee Provision is Unambiguous

As described at length in PHA's opening brief, the language of the Lease is clear. "The Court shall award attorney fees and costs incurred as appropriate." CP at 92:3(E). The trial court's reasoning that the term "as appropriate" in the Lease's attorney's fee provision allows it to consider Tenant's financial status undermines contract law by making the agreement unpredictable. CP at 18:11-14. Additionally, this interpretation of the provision is grammatically incorrect. A prepositional phrase, "as appropriate"

in this case, modifies the word or grouping of words immediately in front of it in the sentence.¹ The phrase “as appropriate” in the Lease provision modifies the noun grouping “attorney fees and costs incurred” meaning the trial court shall award appropriately incurred attorney fees and costs, such as those incurred by PHA in the present matter.

A finding by this Court that a party to any contract can be excused from the obligations of that agreement based on their financial circumstance would contradict decades of Washington State case law which establishes that parties rely on the terms of contracts to “provide certainty and foster reliance” on their agreements. *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. 143, 151, 135 P.3d 547 (2006) (citing Restatement (Second) of Conflict of Laws § 187, cmt. e (1971)). PHA relied on the Lease to insure Tenant’s compliance with every term and protect PHA’s interests in providing her affordable housing. In turn, Tenant relied on the same Lease to insure her interests in leasing from PHA. When Tenant breached the Lease by failing to pay her rent as required, PHA incurred expenses in attempting to remedy Tenant’s breach of the Lease. Tenant expressly and unambiguously agreed to be responsible for these expenses.

Further, the trial court’s reasoning could produce wildly unpredictable results. For example, a wealthy tenant could be charged significantly more than the court-determined reasonable attorney’s fees and costs if a court found the increased amount “appropriate.” Moreover, had Tenant’s financial circumstances changed during the term of her tenancy, the trial court’s

¹ Grammar Handbook: Prepositional Phrases, Center for Writing Studies, Univ. of Illinois at Urbana-Champaign (last visited April 24, 2017), <http://www.cws.illinois.edu/workshop/writers/prepphrases/>.

reasoning would mean the full \$2,246.60 would be chargeable to Tenant. This level of uncertainty is wildly inappropriate and contradicts basic contract theory. The language of the Lease is unambiguous. The trial court's interpretation of the Lease language creates ambiguity in the agreement by allowing a party's financial circumstance to be a contract enforcement consideration.

B. The Parties Did Not Settle or Stay the Writ of Restitution

Tenant's arguments that the matter was "settled" or the execution of the Writ of Restitution was "stayed" add to the confusion of this issue. Resp't's Br. 6-9. As discussed in PHA's opening brief, this matter was worked out between the parties *after* the trial court entered an order in favor of PHA—making PHA the prevailing party. Appellant's Br. 1. This issue was not questioned at the trial court level or raised on appeal by Tenant. This Court is not asked to consider the legitimacy of the judgment entered against Tenant. Additionally, Tenant never sought an order staying the execution of the Writ of Restitution and no such order was entered by the trial court in the matter.

C. The Record Has No Evidence of Tenant's Financial Status on Which to Base a Reduction of PHA's Attorneys' Fees and Costs

Tenant argues that her tenancy in "subsidized" or "public" housing should be sufficient for the trial court to establish her financial status. Resp't's Br. 7. This issue was not raised by Tenant at the trial court level. Tenant provided absolutely no evidence to the trial court of Tenant's financial status or wherewithal. For these basic reasons, this issue is not properly

before this Court. In addition, when determining reimbursable fees and costs incurred by PHA under the Lease, Tenant's financial status is simply irrelevant.

Tenant failed to supply the trial court (or this Court) any evidence to establish her economic status and instead relies entirely on fact that she was living in "subsidized" or "public housing" as evidence that she continues to be low income. During the term of the Lease, Tenant lived in PHA's Eklund Heights development. CP at 92. Eklund Heights is not a public housing project and the only subsidy provided for the development was during construction. Eklund Heights was built using HOME Investment Partnership Program funds and the development is governed by the requirements of 24 C.F.R. Part 92, not 24 C.F.R. § 966 or 24 C.F.R. § 982 as argued by Tenant. Resp't's Br. 9, 12. Residents at Eklund Heights must qualify based on income for housing and are offered low cost housing as a requirement of the HOME Investment Partnership Program. 24 C.F.R. § 92.252. Neither the Eklund Heights residents nor PHA receive a subsidy for monthly rent payments.

Further, Tenant acknowledges that she does not receive income assistance, instead she receives spousal support. Resp't's Br. 6-7. As she no longer lives in PHA housing and PHA has no means by which to verify her income, there is no evidence on the record of Tenant's supposed financial status. CP at 21, 25. With no evidence to establish Tenant's economic status, the trial court had no basis on which to reduce PHA's reasonable attorneys' fees and costs and this issue should be disregarded by this Court in consideration of PHA's appeal.

D. Tenant should not be awarded attorneys' fees and costs.


In the event this Court finds that the Lease between the parties is ambiguous or provides the authority for a court to reduce reasonable attorney fees and costs, the Court should not award fees and costs against PHA, a public housing authority with a limited budget used to provide housing to low-income individuals and families. An attorney fee award against PHA would impact its operational budget and programs in a way that would deprive innocent individuals and families in Clallam County of the housing resources they desperately need. As such, an award of attorney fees and costs to Tenant would not be appropriate in this matter.

III. CONCLUSION

As argued in PHA's opening brief and this reply, this Court should reverse the trial court because it abused its discretion when it reduced PHA's attorneys' fees and costs based on Tenant's supposed economic status. The judgment should be remanded for entry of a judgment for the full amount of PHA's reasonable attorneys' fees and costs.

Respectfully submitted this 12 day of May, 2017.

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APPENDIX

24 C.F.R. 92.252

[78 FR 44670, July 24, 2013, as amended at 81 FR 92635, Dec. 20, 2016]

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§92.252 Qualification as affordable housing: Rental housing.

The HOME-assisted units in a rental housing project must be occupied by households that are eligible as low-income families and must meet the requirements of this section to qualify as affordable housing. If the housing is not occupied by eligible tenants within six months following the date of project completion, HUD will require the participating jurisdiction to submit marketing information and, if appropriate, submit a marketing plan. HUD will require the participating jurisdiction to repay HOME funds invested in any housing unit that has not been rented to eligible tenants 18 months after the date of project completion. The affordability requirements also apply to the HOME-assisted non-owner-occupied units in single-family housing purchased with HOME funds in accordance with §92.254. The tenant must have a written lease that complies with §92.253.

(a) *Rent limitation.* HUD provides the following maximum HOME rent limits. The rent limits apply to the rent plus the utilities or the utility allowance. The maximum HOME rents (High HOME Rents) are the lesser of:

(1) The fair market rent for existing housing for comparable units in the area as established by HUD under 24 CFR 888.111; or

(2) A rent that does not exceed 30 percent of the adjusted income of a family whose annual income equals 65 percent of the median income for the area, as determined by HUD, with adjustments for number of bedrooms in the unit. The HOME rent limits provided by HUD will include average occupancy per unit and adjusted income assumptions.

(b) *Additional rent limitations (Low HOME Rents).* The participating jurisdiction may designate (in its written agreement with the project owner) more than the minimum HOME units in a rental housing project, regardless of project size, to have Low HOME Rents that meet the requirements of this paragraph (b). In rental projects with five or more HOME-assisted rental units, at least 20 percent of the HOME-assisted units must be occupied by very low-income families and meet one of the following rent requirements:

(1) The rent does not exceed 30 percent of the annual income of a family whose income equals 50 percent of the median income for the area, as determined by HUD, with adjustments for smaller and larger families. HUD provides the HOME rent limits which include average occupancy per unit and adjusted income assumptions. However, if the rent determined under this paragraph is higher than the applicable rent under paragraph (a) of this section, then the maximum rent for units under this paragraph is that calculated under paragraph (a) of this section.

(2) The rent does not exceed 30 percent of the family's adjusted income. If the unit receives Federal or State project-based rental subsidy and the very low-income family pays as a contribution toward rent not more than 30 percent of the family's adjusted income, then the maximum rent (i.e., tenant contribution plus project-based rental subsidy) is the rent allowable under the Federal or State project-based rental subsidy program.

(c) *Additional rent limitations for SRO projects.* (1) For SRO units that have both sanitary and food preparation facilities, the maximum HOME rent is based on the zero-bedroom fair market rent. The project must meet the requirements of paragraphs (a) and (b) of this section.

(2) For SRO units that have no sanitary or food preparation facilities or only one of the two, the maximum HOME rent is based on 75 percent of the zero-bedroom fair market rent. The project is not required to have low HOME rents in accordance with paragraph (b)(1) or (2) of this section, but must meet the occupancy requirements of paragraph (b) of this section.

(d) *Initial rent schedule and utility allowances.* (1) The participating jurisdiction must establish maximum monthly allowances for utilities and services (excluding telephone) and update the allowances annually. The participating jurisdiction must use the HUD Utility Schedule Model or otherwise determine the utility allowance for the project based on the type of utilities used at the project.

(2) The participating jurisdiction must review and approve rents proposed by the owner for units, subject to the maximum rent limitations in paragraphs (a) or (b) of this section. For all units subject to the maximum rent limitations in paragraphs (a) or (b) of this section for which the tenant is paying utilities and services, the participating jurisdiction must ensure that the rents do not exceed the maximum rent minus the monthly allowances for utilities and services.

(e) *Periods of affordability.* The HOME-assisted units must meet the affordability requirements for not less than the applicable period specified in the following table, beginning after project completion.

(1) The affordability requirements:

(i) Apply without regard to the term of any loan or mortgage, repayment of the HOME investment, or the transfer of ownership;

(ii) Must be imposed by a deed restriction, a covenant running with the land, an agreement restricting the use of the property, or other mechanisms approved by HUD and must give the participating jurisdiction the right to require specific performance (except that the participating jurisdiction may provide that the affordability restrictions may terminate upon foreclosure or transfer in lieu of foreclosure); and

(iii) Must be recorded in accordance with State recordation laws.

(2) The participating jurisdiction may use purchase options, rights of first refusal or other preemptive rights to purchase the housing before foreclosure or deed in lieu of foreclosure in order to preserve affordability.

(3) The affordability restrictions shall be revived according to the original terms if, during the original affordability period, the owner of record before the foreclosure, or deed in lieu of foreclosure, or any entity that includes the former owner or those with whom the former owner has or had family or business ties, obtains an ownership interest in the project or property.

(4) The termination of the restrictions on the project does not terminate the participating jurisdiction's repayment obligation under §92.503(b).

Rental housing activity	Minimum period of affordability in years
Rehabilitation or acquisition of existing housing per unit amount of HOME funds: Under \$15,000	5
\$15,000 to \$40,000	10
Over \$40,000 or rehabilitation involving refinancing	15
New construction or acquisition of newly constructed housing	20

(f) *Subsequent rents during the affordability period.* (1) The maximum HOME rent limits are recalculated on a periodic basis after HUD determines fair market rents and median incomes. HUD then provides the new maximum HOME rent limits to participating jurisdictions. Regardless of changes in fair market rents and in median income over time, the HOME rents for a project are not required to be lower than the HOME rent limits for the project in effect at the time of project commitment.

(2) The participating jurisdiction must provide project owners with information on updated HOME rent limits so that rents may be adjusted (not to exceed the maximum HOME rent limits in paragraph (f)(1) of this section) in accordance with the written agreement between the participating jurisdiction and the owner. Owners must annually provide the participating jurisdiction with information on rents and occupancy of HOME-assisted units to demonstrate compliance with this section. The participating jurisdiction must review rents for compliance and approve or disapprove them every year.

(3) Any increase in rents for HOME-assisted units is subject to the provisions of outstanding leases, and in any event, the owner must provide tenants of those units not less than 30 days prior written notice before implementing any increase in rents.

(g) *Adjustment of HOME rent limits for an existing project.* (1) Changes in fair market rents and in median income over time should be sufficient to maintain the financial viability of a project within the HOME rent limits in this section.

(2) HUD may adjust the HOME rent limits for a project, only if HUD finds that an adjustment is necessary to support the continued financial viability of the project and only by an amount that HUD determines is necessary to maintain continued financial viability of the project. HUD expects that this authority will be used sparingly.

(h) *Tenant income.* The income of each tenant must be determined initially in accordance with §92.203(a)(1)(i). In addition, each year during the period of affordability the project owner must re-examine each tenant's annual income in accordance with one of the options in §92.203 selected by the participating jurisdiction. An owner of a multifamily project with an affordability period of 10 years or more who re-examines tenant's annual income through a statement and certification in accordance with §92.203(a)(1)(ii), must examine the income of each tenant, in accordance with §92.203(a)(1)(i), every sixth year of the affordability period. Otherwise, an owner who accepts the tenant's statement and certification in accordance with §92.203(a)(1)(ii) is not required to examine the income of tenants in multifamily or single-family projects unless there is evidence that the tenant's written statement failed to completely and accurately state information about the family's size or income.

(i) *Over-income tenants.* (1) HOME-assisted units continue to qualify as affordable housing despite a temporary noncompliance caused by increases in the incomes of existing tenants if actions satisfactory to HUD are being taken to ensure that all vacancies are filled in accordance with this section until the noncompliance is corrected.

(2) Tenants who no longer qualify as low-income families must pay as rent the lesser of the amount payable by the tenant under State or local law or 30 percent of the family's adjusted income, except that tenants of HOME-assisted units that have been allocated low-income housing tax credits by a housing credit agency pursuant to section 42 of the Internal Revenue Code of 1986 (26 U.S.C. 42) must pay rent governed by section 42. In addition, in projects in which the HOME units are designated as floating pursuant to paragraph (j) of this section, tenants who no longer qualify as low-income are not required to pay as rent an amount that exceeds the market rent for comparable, unassisted units in the neighborhood.

(j) *Fixed and floating HOME units.* In a project containing HOME-assisted and other units, the participating jurisdiction may designate fixed or floating HOME units. This designation must be made at the time of project commitment in the written agreement between the participating jurisdiction and the owner, and the HOME units must be identified not later than the time of initial unit

occupancy. Fixed units remain the same throughout the period of affordability. Floating units are changed to maintain conformity with the requirements of this section during the period of affordability so that the total number of housing units meeting the requirements of this section remains the same, and each substituted unit is comparable in terms of size, features, and number of bedrooms to the originally designated HOME-assisted unit.

(k) *Tenant selection.* The tenants must be selected in accordance with §92.253(d).

(l) *Ongoing responsibilities.* The participating jurisdiction's responsibilities for on-site inspections and financial oversight of rental projects are set forth in §92.504(d).

[61 FR 48750, Sept. 16, 1996, as amended at 62 FR 28929, May 28, 1997; 62 FR 44840, Aug. 22, 1997; 78 FR 44672, July 24, 2013]

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§92.253 Tenant protections and selection.

(a) *Lease.* There must be a written lease between the tenant and the owner of rental housing assisted with HOME funds that is for a period of not less than 1 year, unless by mutual agreement between the tenant and the owner a shorter period is specified. The lease must incorporate the VAWA lease term/addendum required under §92.359(e), except as otherwise provided by §92.359(b).

(b) *Prohibited lease terms.* The lease may not contain any of the following provisions:

(1) *Agreement to be sued.* Agreement by the tenant to be sued, to admit guilt, or to a judgment in favor of the owner in a lawsuit brought in connection with the lease;

(2) *Treatment of property.* Agreement by the tenant that the owner may take, hold, or sell personal property of household members without notice to the tenant and a court decision on the rights of the parties. This prohibition, however, does not apply to an agreement by the tenant concerning disposition of personal property remaining in the housing unit after the tenant has moved out of the unit. The owner may dispose of this personal property in accordance with State law;

(3) *Excusing owner from responsibility.* Agreement by the tenant not to hold the owner or the owner's agents legally responsible for any action or failure to act, whether intentional or negligent;

(4) *Waiver of notice.* Agreement of the tenant that the owner may institute a lawsuit without notice to the tenant;

(5) *Waiver of legal proceedings.* Agreement by the tenant that the owner may evict the tenant or household members without instituting a civil court proceeding in which the tenant has the opportunity to present a defense, or before a court decision on the rights of the parties;

(6) *Waiver of a jury trial.* Agreement by the tenant to waive any right to a trial by jury;

(7) *Waiver of right to appeal court decision.* Agreement by the tenant to waive the tenant's right to appeal, or to otherwise challenge in court, a court decision in connection with the lease;

(8) *Tenant chargeable with cost of legal actions regardless of outcome.* Agreement by the tenant to pay attorney's fees or other legal costs even if the tenant wins in a court proceeding by the owner against the tenant. The tenant, however, may be obligated to pay costs if the tenant loses; and

(9) *Mandatory supportive services.* Agreement by the tenant (other than a tenant in transitional housing) to accept supportive services that are offered.

(c) *Termination of tenancy.* An owner may not terminate the tenancy or refuse to renew the lease of a tenant of rental housing assisted with HOME funds, except for serious or repeated violation of the terms and conditions of the lease; for violation of applicable Federal, State, or local law; for completion of the tenancy period for transitional housing or failure to follow any required transitional housing supportive services plan; or for other good cause. Good cause does not include an increase in the tenant's income or refusal of the tenant to purchase the housing. To terminate or refuse to renew tenancy, the owner must serve written notice upon the tenant specifying the grounds for the action at least 30 days before the termination of tenancy.

(d) *Tenant selection.* An owner of rental housing assisted with HOME funds must comply with the affirmative marketing requirements established by the participating jurisdiction pursuant to §92.351(a). The owner must adopt and follow written tenant selection policies and criteria that:

(1) Limit the housing to very low- income and low-income families;

(2) Are reasonably related to the applicants' ability to perform the obligations of the lease (i.e., to pay the rent, not to damage the housing; not to interfere with the rights and quiet enjoyment of other tenants);

(3) Limit eligibility or give a preference to a particular segment of the population if permitted in its written agreement with the participating jurisdiction (and only if the limitation or preference is described in the participating jurisdiction's consolidated plan).

(i) Any limitation or preference must not violate nondiscrimination requirements in §92.350. A limitation or preference does not violate nondiscrimination requirements if the housing also receives funding from a Federal program that limits eligibility to a particular segment of the population (e.g., the Housing Opportunity for Persons with AIDS program under 24 CFR part 574, the Shelter Plus Care program under 24 CFR part 582, the Supportive Housing program under 24 CFR part 583, supportive housing for the elderly or persons with disabilities under 24 CFR part 891), and the limit or preference is tailored to serve that segment of the population.

(ii) If a project does not receive funding from a Federal program that limits eligibility to a particular segment of the population, the project may have a limitation or preference for persons with disabilities who need services offered at a project only if:

(A) The limitation or preference is limited to the population of families (including individuals) with disabilities that significantly interfere with their ability to obtain and maintain housing;

(B) Such families will not be able to obtain or maintain themselves in housing without appropriate supportive services; and

(C) Such services cannot be provided in a nonsegregated setting. The families must not be required to accept the services offered at the project. In advertising the project, the owner may advertise the project as offering services for a particular type of disability; however, the project must be open to all otherwise eligible persons with disabilities who may benefit from the services provided in the project.

(4) Do not exclude an applicant with a certificate or voucher under the Section 8 Tenant-Based Assistance: Housing Choice Voucher Program (24 CFR part 982) or an applicant participating in a HOME tenant-based rental assistance program because of the status of the prospective tenant as a holder of such certificate, voucher, or comparable HOME tenant-based assistance document.

(5) Provide for the selection of tenants from a written waiting list in the chronological order of their application, insofar as is practicable;

(6) Give prompt written notification to any rejected applicant of the grounds for any rejection; and

(7) Comply with the VAWA requirements prescribed in §92.359.

[61 FR 48750, Sept. 16, 1996, as amended at 67 FR 61756, Oct. 1, 2002; 78 FR 44674, July 24, 2013; 81 FR 80803, Nov. 16, 2016]

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§92.254 Qualification as affordable housing: Homeownership.

(a) *Acquisition with or without rehabilitation.* Housing that is for acquisition by a family must meet the affordability requirements of this paragraph (a).

(1) The housing must be single family housing.

(2) The housing must be modest housing as follows:

(i) In the case of acquisition of newly constructed housing or standard housing, the housing has a purchase price for the type of single family housing that does not exceed 95 percent of the median purchase price for the area, as described in paragraph (a)(2)(iii) of this section.

(ii) In the case of acquisition with rehabilitation, the housing has an estimated value after rehabilitation that does not exceed 95 percent of the median purchase price for the area, described in paragraph (a)(2)(iii) of this section.

(iii) If a participating jurisdiction intends to use HOME funds for homebuyer assistance or for the rehabilitation of owner-occupied single-family properties, the participating jurisdiction must use the HOME affordable homeownership limits provided by HUD for newly constructed housing and for existing housing. HUD will provide limits for affordable newly constructed housing based on 95 percent of the median purchase price for the area using Federal Housing Administration (FHA) single family mortgage program data for newly constructed housing, with a minimum limit based on 95 percent of the U.S. median purchase price for new construction for nonmetropolitan areas. HUD will provide limits for affordable existing housing based on 95 percent of the median purchase price for the area using Federal FHA single family mortgage program data for existing housing data and other appropriate data that are available nation-wide for sales of existing housing, with a minimum limit based on 95 percent of the state-wide nonmetropolitan area median purchase price using this data. In lieu of the limits provided by HUD, the participating jurisdiction may determine 95 percent of the median area purchase price for single family housing in the jurisdiction annually, as follows. The participating jurisdiction must set forth the price for different types of single family housing for the jurisdiction. The participating jurisdiction may determine separate limits for existing housing and newly constructed housing. For housing located

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